

August 12, 2013

John R. Reed, CCIM  
MVP COMMERCIAL  
P. O. Box 338  
Oakhurst, CA 93644

Re: Your Request for Informal Assistance  
**Our File No. I-13-091**

Dear Mr. Reed:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature and not limited to a specific governmental decision, we are treating your request as one for informal assistance.<sup>2</sup>

The Commission does not provide advice on bodies of law outside of the Act. We offer no opinion on the application of other incompatible activities and conflict-of-interest laws that may apply including common law conflict of interest and Government Code Section 1090. You should consult your county counsel regarding these and any other restrictions that may apply.

### QUESTION

As a planning commissioner for Madera County, who has also been hired by the county as a real estate broker to sell a parcel of property, does the Act preclude you from (1) appearing before the planning commission or county staff as a representative of the county in decisions related to the sale of the property, (2) assisting for compensation the prospective buyer of the property in the processing of a subdivision map required by the buyer as a condition of the offer,

---

<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

(3) acquiring an investment interest in the buyer's project, or (4) accepting the buyer's offer to hire you to sell lots after the sale of the property?

## **CONCLUSION**

You may take part in decisions before the planning commission relating to the sale of the property so long as you are acting solely as the county's real estate broker and your actions are within the terms and conditions of your contract with the county.<sup>3</sup> Similarly, you may appear before county staff in a decision involving the sale of the property, which may subsequently come before the planning commission, so long as you are acting solely as the county's real estate broker and your actions are within the terms and conditions of your contract with the county.

However, you are prohibited from taking part in decisions before the planning commission related to the sale of the property, and decisions before county staff related to the sale of the property that may subsequently come before the planning commission, if you have (1) agreed to or are negotiating to assist the buyer for compensation in the processing of the subdivision map, (2) acquired an interest in the property, or (3) accepted or are negotiating the buyer's offer to hire you to sell lots. In other words, you are disqualified from taking part in decisions relating to the sale of the property, even as the county's real estate broker, if you have agreed to or are negotiating employment with the buyer or have acquired an interest in the property.

## **FACTS**

You are a planning commissioner in Madera County. You have also been hired by the county as a real estate broker to represent the county in the sale of an essentially vacant parcel owned by the county consisting of approximately 10 acres.

In representing the county, you have been approached by a prospective buyer who has asked you to write a creative offer for the land, asking the county to process a subdivision map for the buyer and deliver the land in multiple parcels at close of escrow. You subsequently drafted the offer and the county is currently interested in accepting it, after scheduling an advertised public auction for the property, wherein the offer will be the opening bid.

As drafted the offer will require, in addition to map approval, a General Plan change and a rezoning. The buyer has expressed interest in hiring you to assist in submitting a map for the county's approval. Compensation for your services pertaining to the map approval would be paid by the buyer. Compensation may be in the form of a cash payment or an interest in the project. You are also considering purchasing an interest in the project. Additionally, the buyer has asked whether you are willing to list and sell the finished lots for him after the purchase of the property.

---

<sup>3</sup> For a decision before the planning commission at a public meeting, you may take part in the decision solely as a representative of the county only after publicly recusing yourself from the decision and stepping down from the dais.

## ANALYSIS

### **Conflict of Interest Provisions**

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision.

#### **Step One: Are you a “public official?”**

The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency....” (Section 82048.) As a member of the planning commission<sup>4</sup>, you are a public official within the meaning of the Act.<sup>5</sup>

#### **Step Two: Are you making, participating in making, or influencing a governmental decision.**

The Act’s conflict-of-interest provisions apply only when a public official “make[s], participate[s] in making, or in any way attempts to use his [or her] official position to influence a governmental decision in which he [or she] knows or has reason to know he [or she] has a financial interest.” (Section 87100; Regulation 18700(b)(2).) In other words, an official is not prohibited from contacting an agency under the Act’s conflict-of-interest provisions if the official is not making, participating in making, or influencing a governmental decision. The Commission has adopted a series of regulations defining “making,” “participating in making,” and “influencing” a governmental decision. (Regulations 18702-18702.3.)

*Making a Governmental Decision:* A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter,

---

<sup>4</sup> In itself, representing the county in the sale of the parcel as a real estate broker would not qualify you as a public official or a consultant of the county. (See Regulation 18701(a)(2).)

<sup>5</sup> If a public official’s office is listed in Section 87200, which specifically includes members of a planning commission, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5 subdivisions (c) and (d) apply. (Section 87105.)

appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; Regulation 18702.1(a).)

*Participating in Making a Governmental Decision:* A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decision-maker regarding the governmental decision. (Section 87100; Regulation 18702.2.)

*Influencing a Governmental Decision:* There are two rules that address whether a public official is using or attempting to use his or her official position to influence a governmental decision. The first rule applies when the governmental decision is within or before the public official’s own agency or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(a).) In these cases, if “the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency” then he or she is attempting to influence a governmental decision. This includes “appearances or contacts by the official on behalf of a business entity, client, or customer.”

The second rule applies when the governmental decision is within or before an agency other than the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(b).) Under this rule, the official cannot act or purport “to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency” to influence a decision that will have a material financial effect on his or her interests.

While a public official may not contact staff of his or her own agency for the purpose of influencing a decision in which he or she has a financial interest, including contacts on behalf of a business entity, client, or customer, a public official may contact *other staff* so long as the official makes it clear that he or she is not purporting to speak on behalf of his or her agency.

Based upon the facts provided, it appears that decisions regarding the property you have contracted with the county to sell will come before the planning commission. In regard to whether you as a planning commissioner may contact other county employees regarding the property, we must determine whether you are using your position to influence your own agency or an agency other than your own agency in contacting another county employee.

Previously, we advised in the *Farrell* Advice Letter, No. I-03-121:

“[I]t is important to realize that staff does not exist in a vacuum; it is not a generic entity with its own identity. Rather, staff is a component of the agency to which it is assigned. An “agency” includes the staff assigned exclusively to a public official’s agency (*Larmore* Advice Letter, No. A-00-275; *Martello* Advice Letter, No. A-85-190) as well as staff that are shared between that and another agency (*West* Advice Letter, No. A-88-413).”

Accordingly, we concluded that a member of a design review board could not meet or communicate with a staff member of another city department on behalf of a client if (1) the staff member is assigned or involved in a project, analysis, presentation, or other matter that is or will be brought before the design review board, and (2) it is reasonably foreseeable that the design review board's decision regarding the item in which the staff member is involved will have a material financial effect on one or more of the member's interests. In short, when staff is shared for a project which is, or will be, before the official's agency, meeting or otherwise communicating with the shared staff regarding the project is an appearance or communication with the official's own agency. (*Farrell* Advice Letter, *supra*, also see *Fulhorst* Advice Letter, No. I-12-045.)

However, as a real estate agent hired by the county to sell the property, you are not making, participating in making, or using your position to influence a decision so long as the action relates solely to the terms and conditions of your contract with the county and you are acting in a private capacity, or in other words, so long as you are solely representing the county within the terms of your contract with the county. (Regulation 18702.4(a)(3) and (b)(3).)

Applied to your facts, you are making, participating in making, or using your position to influence a decision if you take part in any planning commission decision regarding the property, other than a decision in which you are solely representing the county as its real estate broker under the terms and conditions of your contract. Moreover, you are also using your position to influence a decision if you appear before or communicate with any county employee regarding a decision involving the property that will come before the planning commission unless you are solely representing the county as its real estate broker under the terms and conditions of your contract.

### **Step Three: What are the official's interests that may be affected by the decision?**

Of the interests recognized under Section 87103 of the Act<sup>6</sup>, those interests that may be implicated by your account of the facts are the following:

*Business Entity* – A public official has an interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more, or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulation 18703.1(a) and (b).)

*Source of Income* – A public official has an interest in any source of income, including promised income, which aggregates to \$500 or more within the 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

---

<sup>6</sup> Our analysis is limited to the interests you have identified.

*Real Property* – A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more including a pro rata share of interests in real property of any business entity or trust in which the official owns, directly, indirectly or beneficially, a 10-percent interest or greater. (Section 87103(b); Regulation 18703.2.)

*Personal Finances* – A public official has an interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

#### Real Estate Brokerage/Consulting Business

As a real estate broker and consultant, it appears that you have an interest in your brokerage/consulting business as a business entity. Assuming that you have received income from the business of \$500 or more in the 12 months prior to the decision, you also have an interest in the business as a source of income.

#### Madera County

While the term “income” excludes salary and reimbursement for expenses or per diem received from a state, local or federal governmental agency (Section 82030(b)(2)), we have advised that compensation from a governmental agency constitutes salary that is exempted from the definition of “income” only when received as an employee or consultant of the agency. (*Kohn Advice Letter*, No. I-93-294.) The “governmental salary” exclusion does not apply to payments received as an independent contractor. Thus, you also have an interest in Madera county as a source of income to the extent that the income you have received or been promised, such as your commission at the close of escrow, for the sale of the property is \$500 or more in the 12 months prior to the decision.

#### Potential Buyer of Property

Pursuant to Regulation 18703.3(c)(1), the source of commission income to a real estate broker is limited to the person the broker represents in the transaction, a person represented by an agent working under the broker’s auspices, any broker business entity through which the broker conducts business, and any person who receives a finder’s fee or referral fee for refereeing a party to the transaction to the broker or makes a referral pursuant to a contract with the broker. Generally, a real estate broker representing only the seller in a transaction does not typically have an interest in the buyer.

However, you have asked if you would have a disqualifying conflict of interest if you are paid by the buyer of the property to assist the buyer in the processing of a subdivision map for the property prior to the purchase. Payment for your services would either be in the form of a cash payment or an investment interest in the property. Because income includes promised income, you have an economic interest in the buyer of the property as a source of income if you

agree to provide services to the buyer (assuming that you have been promised cash or an investment interest valued at \$500 or more.)

### Property for Sale

You have indicated that you are also considering investing in the project or may receive an investment interest in the buyer's project for services provided to the buyer. To the extent that you make an investment in the property of \$2,000 or more, you will also have an economic interest in the property.

### Personal Finances

A public official always has an interest in his or her personal finances. A governmental decision will have an effect on this interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.)<sup>7</sup>

### **Step Four: Are the official's interests directly or indirectly involved in the decision?**

Regulation 18704.1(a) states that a business entity or source of income is *directly* involved in a decision before the official's agency when that business entity or source of income, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

For interest in real property, Regulation 18704.2(a) states in pertinent part that real property in which a public official has an economic interest is *directly* involved in a governmental decision if:

“(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision....

---

<sup>7</sup> A financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest is not considered a separate financial effect on an official's personal finances and would not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not appear to apply to your circumstances and we will not discuss it further.

“(2) The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest....”

Interests that are not directly involved in a governmental decision are regarded as *indirectly* involved. (Regulations 18704(a).)

In regard to any decision involving the sale of the county’s property, your interests in your business, the county, and potentially the buyer of the property are directly involved in any decision as either a decision initiated by the business, the county, or the buyer or as a named party in, or subject of, the proceeding. Moreover, your potential economic interest in the property for sale, should you invest in the property, is also directly involved in any decision involving the sale of the property.

**Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official’s interests?**

### **Materiality**

Having identified the interests involved, and determined whether each interest is directly or indirectly involved in the decision at issue, it is necessary to identify the materiality standard appropriate to each interest.

For purposes of directly involved interests in business entities, sources of income, and real property including your interests in your business, the county, and potentially the buyer of the property and the property itself, the financial effects of a governmental decision on these interests are presumed to be material. (Regulations 18705.1(b)(2), 18705.2, and 18705.3(a). In other words, the size of a financial effect on any directly involved interest does not matter. If there is *any* financial effect at all, even “one-penny,” that effect is presumed to be material.

### **Foreseeability**

Once a public official has determined the materiality standard applicable to each of his or her interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. For a material financial effect to be foreseeable on an official’s interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*), the foreseeability of a particular financial effect is a determination that must be left, in



most instances, to the informed judgment of the public official.

Nonetheless, the facts you have presented do indicate a reasonably foreseeable material financial effect on your interests in your business, the county, and potentially the buyer and the property itself, because the financial effects on these directly involved interests are presumed to be material. Accordingly, you have a disqualifying conflict of interest to the extent that you are making, participating in making, or using your position to influence a decision regarding the property. While you are not making, participating in making, or using your position to influence a decision so long as you are acting solely as the county's real estate broker pursuant to the exception provided in Regulation 18702.4(a)(3) and (b)(3), you are making, participating in making, or using your position to influence decisions regarding the property to the extent that you are acting in any manner other than the county's real estate broker.

However, you are prohibited from taking part in decisions before the planning commission related to the sale of the property, and decisions before county staff related to the sale of the property that may subsequently come before the planning commission, if you (1) assist the buyer for compensation in the processing of the subdivision map, (2) acquire an interest in the property, or (3) accept the buyer's offer to hire you to sell lots.

**Steps Seven and Eight: Does this governmental decision come within any exception to the conflict-of-interest rules?**

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the "legally required participation" exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, you have not presented any facts indicating that the "public generally" or the "legally required participation" exceptions are applicable to your circumstances, so we will not address them further.

**Section 87407: Influencing Prospective Employment**

In addition to the conflict-of-interest provisions, Section 87407 prohibits public officials from making, participating in making, or using their position to influence certain decisions affecting a potential employer if the official is negotiating or has an arrangement regarding prospective employment. While an official may negotiate and accept an offer of future employment while employed by a governmental agency, Section 87407 requires that the official

does not use his or her governmental position to make decisions that unduly benefit the person hiring the official. More specifically, Section 87407 states:

“No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.”

A public official is “negotiating” employment when he or she interviews or discusses an offer of employment with an employer or his or her agent. (Regulation 18747(c)(1).) A public official has an “arrangement” concerning prospective employment when he or she accepts an offer of employment. (Regulation 18747(c)(2).)

Based upon the facts provided, you have been offered future employment by the prospective buyer of the property. Pursuant to Section 87407 of the Act, you are prohibited from taking part in the decisions affecting the buyer, even as the county’s real estate broker unless you decline the offer of future employment.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Brian G. Lau  
Counsel, Legal Division

BGL:jgl